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78-1906

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALBERT B. ALKEK
AND
FOREMOST PETROLEUM CORPORATION, INC.,
PETITIONERS,

v.

NEWMAN OIL COMPANY, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

KEITH A. JONES
Fulbright & Jaworski
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

THOMAS R. McDADE
STEVEN E. SEGAL
WILLIAM R. PAKALKA
LOUIS S. ZIMMERMAN
DAVID L. TOLIN
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002
(713) 651-5151

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Albert B. Alkek and Foremost Petroleum Corporation, Inc., petition for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. B, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1979 (App. C, *infra*). A timely petition for rehearing, with suggestion of rehearing *en banc*, was denied on May 25, 1979 (App. D, *infra*). The jurisdiction of this Court is invoked under section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (1976).

QUESTION PRESENTED

Whether a private nondiversity action sounding in common-law fraud, alleging that the defendant induced the plaintiff to enter into an unfavorable agreement by means of false and fraudulent promises and representations, is within the exclusive original jurisdiction conferred on the federal district courts by the Economic Stabilization Act of 1970.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, of the Constitution in pertinent part provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more states;— between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming

> Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Sections 210(a) and 211(a) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, provide:

> Section 210(a). Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.
>
> Section 211(a). The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

STATEMENT

Respondents[1] are distributors of motor gasoline.[2] During 1972, respondents purchased motor gasoline from Atlantic Richfield Company ("ARCO"). Pursuant to regulations thereafter promulgated by the Federal Energy Office ("FEO") under the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.*, ARCO therefore became the respondents' "base period supplier" with an obligation to continue to supply them with motor gasoline. 10 C.F.R. §§ 211.9 and 211.102 (1978).

In late 1976, ARCO sold to petitioner Foremost Petroleum Corporation, Inc. ("Foremost"), the pipeline terminals from which it had supplied respondents. At that time, ARCO and Foremost entered into an agreement with each respondent, petitioning the Federal Energy Administration ("FEA")[3] to terminate ARCO's obligations as base period supplier and to assign those obligations to Foremost. FEA approved these

[1] The following companies are respondents here: Newman Oil Company; Advance Petroleum Distributing Company, Inc.; B & H Oil Company; Chambles Oil Company; D & S Service Company, Inc.; ECON-O Gas, Inc.; Fuel Distributors, Inc.; Gabbert Oil Company; Gooding Oil, Inc.; Crain Oil Co.; Havard Oil Company, Inc.; Henderson Oil & Butane Co.; Hinson Oil Co., Inc.; Hunt County Oil Co., Inc.; Ben Ivey Oil Company; Newcomer Butane & Oil Co.; Martin Oil Company; R. L. More & Son; Oates Oil Co.; Permian Oil & Tire Co., Inc.; W. C. Rinks Oil Co.; Rodgers Oil Company; Ray Schilichting Oil Co.; Service Oil Co.; Tandem Oil Co.; Ralph Watson Oil Co., Inc.; March Oil Co., Inc.; Lamberth Oil Co.; Hornet Distributing Co.; Bosse Oil Co.; Stapp Oil Co.; HRNCIR Oil Co.; Whitten Oil Co., Inc.; Mason Oil Company; W. D. (Bill) Young Oil & Supply; J. G. Moore Oil Co.; Neal's Oil & Butane, Inc.; and Kelso Oil Company.

[2] The statement of facts is taken from the opinions of the district court (App. B, *infra*) and the court of appeals (App. A, *infra*).

[3] FEA succeeded to the functions previously performed by FEO on June 27, 1974. Exec. Order No. 11790, 39 Fed. Reg. 23785 (June 27, 1974).

agreements and designated Foremost as respondents' base period supplier in place of ARCO.

Subsequently, a dispute arose between Foremost and respondents regarding the price at which motor gasoline would be supplied to them, and that dispute led to the initiation of this action by respondents in the United States District Court for the Northern District of Texas. Pared to its essentials, and insofar as is relevant here, the complaint alleged (1) that Foremost had violated federal price regulations by selling motor gasoline to respondents at prices in excess of those that would have been determined by reference to the selling prices charged by ARCO on May 15, 1973,[4] and (2) that Foremost and petitioner Albert B. Alkek, who allegedly exercised authority over Foremost's day-to-day operations, had induced respondents to enter into the three-party agreements by means of false and fraudulent promises and representations.[5]

The district court granted summary judgment against respondents with respect to the alleged violation of the federal price regulations, holding that "it is clear that [respondents] have no right to a price charged them by Foremost computed under regulations applicable to Arco." App. B, *infra*, p. 14a. Since there was no diversity of citizenship, the district court did not consider the issue of fraudulent inducement but instead "dismisse[d] without prejudice [respondents'] pendent claims asserted under state law. . . ." App. B, *infra*, p. 15a.

The Temporary Emergency Court of Appeals vacated and remanded on the ground that the district court had improperly

[4] Stated very generally, a refiner may charge a price no higher than the sum of its May 15, 1973, selling price plus its increased costs since May, 1973. See 10 C.F.R. § 212.83 (1978). Respondents' position, therefore, was that Foremost was required to sell at prices determined by reference not to its own May 15, 1973, selling prices but to those of ARCO.

[5] Respondents also named ARCO as a defendant and alleged violations of federal and state antitrust laws and breach of contract. The courts below both recognized that these claims were subordinate to and entirely dependent upon the allegation that Foremost was charging prices in excess of those allowed by the regulations.

converted a motion to dismiss into a motion for summary judgment without affording respondents an opportunity to submit affidavits and extraneous proofs. The court of appeals held that even apart from the alleged violation of the federal price regulations, the district court had jurisdiction over and should proceed to consider respondents' allegations of fraudulent inducement:

> A substantial question has been raised on appeal as to the jurisdiction of the federal court over claims involving common-law fraud. . . . Appellees argue that allegations of fraud are state law claims not cognizable in federal court under the jurisdictional prerequisities of the Economic Stabilization Act (ESA).
>
> . . . . There is case law, from a context closely analogous to the case at bar, that if a cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction unless there is diversity of citizenship. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 250 (1951). Jurisdiction in that case, however, was derived from 28 U.S.C. § § 1331 and 1337 as a civil action arising under an act of Congress regulating commerce. Jurisdiction in the present case is granted under § 210(a) of the ESA for '[A]ny person suffering legal wrong because of any act or practice arising out of this title. . . .' We interpret this language as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA.

App. A, *infra*, pp. 6a-8a (footnote omitted).[6]

[6]The court did not identify the "rights under the EPAA" that respondents allegedly were induced to forego.

REASONS FOR GRANTING REVIEW

The determination by the court of appeals that the federal courts have jurisdiction "over claims involving common-law fraud," App. A, *infra*, p. 6a, is in conflict with this Court's decision in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). The reasoning followed by the court of appeals in reaching its novel result is incompatible with the analysis that has been consistently employed by this Court in resolving similar jurisdictional issues in other cases.

If allowed to stand, the decision below will significantly alter the settled allocation of responsibilities between federal and state courts. Since the jurisdiction conferred on the federal district courts by section 211(a) of the Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. § 1904 note, is both original and exclusive, the effect of the decision below is to divest the state courts of all jurisdiction to try cases involving allegations of fraud relating to the purchase or sale of petroleum or petroleum products and to lodge such jurisdiction exclusively in the federal courts.[7]

1. Respondents claim that they were defrauded into signing agreements that resulted in their payment of higher prices than they otherwise would have been required to pay.[8] This Court

[7]Section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1) (1976) makes section 211 of the ESA applicable to cases arising under the federal energy regulations promulgated pursuant to the EPAA.

[8]Petitioners assert both factual and legal defenses to this claim. Petitioners consistently have denied both that they committed fraud and that respondents were injured by the agreements. As part of their defense, petitioners assert that ARCO could have unilaterally designated Foremost as respondents' supplier and that Foremost's prices under such a unilateral designation would be the same as under the three-party agreements signed by respondents. See Mid-Michigan Truck Services, Inc., 3 FEA ¶ 83,100 (Feb. 13, 1976); Whitco, Inc., 2 FEA ¶ 83,170 (June 9, 1975). It is of course well established that neither the assertion of a federal defense nor even the anticipation of such a defense in the complaint is sufficient to invoke federal question jurisdiction. *E.g.*, Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908); Tennessee v. Union & Planters' Bank, 152

determined that a similar allegation was insufficient to invoke federal jurisdiction in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* The plaintiff in that case had alleged that an interlocking directorship "was used fraudulently to deprive it of its federally conferred right to reasonable rates and charges." 341 U.S. at 249. The Court ruled that federal jurisdiction was not invoked by that allegation: where the "cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction, there being no diversity of citizenship of these parties." *Id.* at 250.

This is not to say, of course, that Congress could not prohibit fraud in commercial or federally regulated activities and confer federal jurisdiction over claims based upon alleged violations of that prohibition. But Congress has not done so here. As the court of appeals recognized, respondents' claim of fraudulent inducement is grounded not upon a federal statutory or regulatory prohibition but upon "common-law fraud." App. A, *infra*, p. 6a.[9] Accordingly, this Court's observation in *Montana-Dakota Utilities* equally applies here:

U.S. 454 (1894). In our view, the petition for a writ of certiorari filed by ARCO in this case fails to give adequate recognition to this principle.

It may be that respondents could bring their allegations of fraud before the Department of Energy in an application for discretionary relief. See 10 C.F.R. § 205.50 *et seq.* See also App. A, *infra*, p. 8a n.5. In this limited sense, therefore, respondents' complaint can be viewed as an effort to obtain judicial resolution of a matter that lies, in the first instance, within the exclusive discretion of the federal agency. To this extent, petitioners adopt the arguments advanced by ARCO in its separate petition for a writ of certiorari. But the fact that respondents have an alternative discretionary administrative remedy does not render their claim here for nondiscretionary relief a federal question. That claim is based solely on common law fraud.

[9]The court of appeals correctly disregarded, and implicitly rejected, respondents' contention, made for the first time in a post-argument brief, that federal energy regulations bar fraud of the type alleged. Those regulations nowhere speak to the question of fraud in private transactions. In any event, it is well established that the federal question on which jurisdiction rests must appear on the face of the complaint. *E.g.*, Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974).

> [A] grievance aris[ing] from active fraud and deceit . . . gains nothing from the Federal Act. Such an action would have been maintainable if no Federal Power Act had been enacted. Before the Act, petitioner would have had no statutory right to a reasonable rate, but it did have a common-law right not to be defrauded into paying an excessive or unreasonable one. The Federal Act adds nothing to fraud as an actionable wrong, and, therefore, to find a cause of action of this character would only be to dismiss it for want of diversity.

Id. at 252.

The court of appeals nevertheless sought to distinguish *Montana-Dakota Utilities* on the ground that it involved different jurisdictional statutes. That attempted distinction fails, however, for the obvious reason that the operative "arising under" language of 28 U.S.C. § § 1331 and 1337, the jurisdictional statutes at issue in *Montana-Dakota Utilities*, is the same as that of section 211(a) of the ESA, 12 U.S.C. § 1904 note. Section 211(a), in language substantially identical to that of 28 U.S.C. § § 1331 and 1337, confers jurisdiction over "cases or controversies arising under this title, or regulations or orders issued thereunder."[10] Since the same "arising under" language was used, there is no reason to believe that in

[10]The court of appeals mistakenly cited section 210(a) of the ESA as the basis for federal jurisdiction. The decisions of that court already have established, and it is clear as well from the statutory text, that it is section 211(a) that confers jurisdiction, whereas section 210(a) operates to establish a private right of action. McCulloch Gas Processing Corp. v. Canadian Hidrogas Resources, Ltd., 577 F.2d 712, 715-16 (TECA), *cert. denied*, 99 S. Ct. 109 (1978); Griffin v. United States, 537 F.2d 1130, 1134-36 (TECA), *cert. denied*, 429 U.S. 919 (1976). In any event, since the scope of section 210(a) also is restricted to matters "arising out of this title," even if section 210(a) were jurisdictional its reach would be no broader than that of section 211(a).

enacting the ESA Congress intended to confer jurisdiction over matters that are not regarded as "federal questions" under 28 U.S.C. § 1331. Section 211(a) differs from 28 U.S.C. § 1331 in only three significant respects: the federal jurisdiction that section 211(a) confers is exclusive; that jurisdiction is conferred without regard to the amount in controversy; and the jurisdiction is limited to a narrow category of federal regulatory matters. None of these differences indicates a congressional intention to confer jurisdiction over nondiversity actions not involving a substantial federal question.

The broad implication of the decision below, therefore, is that the federal courts have jurisdiction over every action in which the plaintiff asserts that the defendant fraudulently induced him to forego a federal right of any kind. But even apart from *Montana-Dakota Utilities*, it is clear that such an action, sounding in common-law fraud, does not fall within the "arising under" jurisdiction of the federal courts. As Mr. Justice Holmes so succinctly explained, "a suit arises under the law that creates the cause of action." *American Well Works, Inc.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). See also, *e.g.*, *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 127-28 (1974); *Gully* v. *First National Bank*, 299 U.S. 109, 112-13 (1936); *Shultis* v. *McDougal*, 225 U.S. 561, 569 (1912). By definition, state law, not federal law, creates the action for common-law fraud. The federal courts lack "arising under" jurisdiction where "the right to be established is one created by the state." *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 663-64 (1961). Moreover, "traditional common-law claims . . . do not lose their character [merely] because it is common knowledge that there exists a [related] scheme of federal regulation. . . ." *Id.* at 663. In short, respondents' allegations of fraud do not fall within the jurisdiction conferred by the ESA, or by 28 U.S.C. § 1331, for such allegations do not assert "a substantial claim founded 'directly' upon federal law." Mishkin, *The Federal "Question" in the Federal Courts*, 53 Col.L.Rev. 157, 165 (1953).

The decision below is incompatible, moreover, not only with the settled scope of statutory "arising under" jurisdiction but also with "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). Indeed, there is grave doubt whether the ESA, as construed by the court of appeals below, is consistent with the limitations on federal jurisdiction inherent in Article III, Section 2, of the Constitution. Cf. *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824).[11]

2. Section 211(a) of the ESA confers on the federal district courts "*exclusive* original jurisdiction of cases or controversies arising under this title" (emphasis added). Accordingly, if, as the court of appeals held, the ESA confers jurisdiction on the federal courts to try claims of common-law fraud relating to the purchase or sale of petroleum or petroleum products,[12] by the same token that statute divests the state courts of all such

[11] We do not argue that the district court below was constitutionally lacking in jurisdiction to consider respondents' common-law claims. The district court may well have had pendent jurisdiction over those claims. But any such pendent jurisdiction terminates upon the grant of summary judgment in favor of petitioners on the federal regulatory issue: "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Moreover, to the extent that the district court might have discretion to exercise continuing pendent jurisdiction over the state claims even after disposition of the federal regulatory issue, the court already has declined to exercise pendent jurisdiction in those circumstances. App. B, *infra*, p. 15a. In any event, the court of appeals foreclosed all considerations pertaining to pendent jurisdiction by holding that the district court has independent jurisdiction over the allegations of common-law fraud.

[12] Almost any such claim could readily be couched in terms of an alleged fraudulent inducement to forego the right to sell (or purchase) the item at no lower (or no higher) that the maximum allowable price set by federal regulations, *i.e.*, in terms of "a fraudulent representation intended to induce one to forego his rights under the EPAA." App. A, *infra*, p. 8a.

jurisdiction. This massive transfer of jurisdiction over traditional common-law claims cannot have been envisioned by Congress and certainly should not have been effected in the casual manner reflected in the opinion below.

Moreover, since the court of appeals below has nationwide jurisdiction under section 211(b)(2) of the ESA, the scope of the decision below is nationwide. Pursuant to that decision, all common-law actions for fraud in the purchase or sale of petroleum products may be removed from state to federal courts, and the appeals in all such cases would go to the court of appeals below. It follows that the decision in this case determines, with a finality that only this Court can erase, the jurisdiction of every federal district court, and of every state court, in the United States.

The decision below thus effects an immediate, broad, and dramatic shift of caseload from state to federal courts. This Court should grant review in order to determine the propriety of this radical change in the traditional allocation of jurisdiction between the state and federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEITH A. JONES
Fulbright & Jaworski
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

THOMAS R. McDADE
STEVEN E. SEGAL
WILLIAM R. PAKALKA
LOUIS S. ZIMMERMAN
DAVID L. TOLIN
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002
(713) 651-5151

June 1979.

APPENDIX A

Temporary Emergency Court of Appeals of the United States

No. 5-32

NEWMAN OIL COMPANY; ADVANCE PETROLEUM DISTRIBUTING COMPANY, INC.; B & H OIL COMPANY; CHAMBLES OIL COMPANY; D & S SERVICE COMPANY, INC.; ECON-O-GAS, INC.; FUEL DISTRIBUTORS, INC.; GABBERT OIL COMPANY; GOODING OIL, INC.; CRAIN OIL CO.; HAVARD OIL COMPANY, INC.; HENDERSON OIL & BUTANE CO.; HINSON OIL CO., INC.; HUNT COUNTY OIL CO., INC.; BEN IVEY OIL COMPANY; NEWCOMER BUTANE & OIL CO.; MARTIN OIL COMPANY; R. L. MORE & SON; OATES OIL CO.; PERMIAN OIL & TIRE CO., INC.; W. C. RINKS OIL CO.; RODGERS OIL COMPANY; RAY SCHLICHTING OIL CO.; SERVICE OIL CO.; TANDEM OIL CO.; RALPH WATSON OIL CO., INC.; MARSH OIL CO., INC.; LAMBERTH OIL CO.; HORNET DISTRIBUTING CO.; BOSSE OIL CO.; STAPP OIL CO.; HRNCIR OIL CO.; WHITTEN OIL CO., INC.; MASON OIL COMPANY; W. D. (BILL) YOUNG OIL & SUPPLY; J. G. MOORE OIL CO.; NEAL'S OIL & BUTANE, INC. and KELSO OIL COMPANY.
PLAINTIFFS-APPELLANTS,

v.

ATLANTIC RICHFIELD COMPANY,
ALBERT B. ALKEK and
FOREMOST PETROLEUM CORPORATION, INC.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division

(No. CA3-77-0435-F)

(Argued December 15, 1978 Decided April 20, 1979)

JOHN FEATHER, Johnston and Feather, P.C., Dallas, Texas (John C. Gabbert on brief) for the Appellants.

THOMAS R. McDADE, Fulbright & Jaworski, Houston, Texas (Alton F. Curry, Steven E. Segal, Louis S. Zimmerman, and David L. Tolin of the same firm on brief) for the Appellees, Albert B. Alkek and Foremost Petroleum Corporation, Inc.

GREGORY S. C. HUFFMAN, Thompson & Knight (Jerry L. Bushmeyer, and David R. McAtee of the same firm on brief and William John Rathje, Los Angeles, California, of counsel) for Appellee, Atlantic Richfield Company.

Before HOFFMAN, INGRAHAM and GEWIN, Judges.

HOFFMAN, Judge.

Appellants, a large number of local distributors of petroleum products, brought suit against appellees alleging violations of the antitrust laws of the United States and Texas, the Emergency Petroleum Allocation Act of 1973 (the EPAA), the Clayton Act as amended, and common law breach of contract and false representation. There is no diversity of citizenship involved. Appellees filed motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court elected to interpret the motions to dismiss as motions for summary judgment, and dismissed with prejudice all of appel-

lants' federal claims without any discovery proceedings. However, the court gave no notice to the parties that the motions were to be disposed of under Rule 56, and no opportunity was provided to file affidavits or other materials pertinent to appellants' claims. We are, therefore, compelled to reverse and remand for further proceedings.

The Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, et seq. (1976), was enacted to alleviate the shortages of petroleum products brought on by the Arab oil embargo. Distributors were required to return to the supplier who had supplied them in the 1972 base period, and were thereafter allocated the available product on a monthly basis in direct proportion to the ratio of the amount of petroleum products they had received from the supplier in the 1972 base period as compared to the total output of that refiner in the corresponding period of each year thereafter. Cost increases in refining the product are added to the base prices, primarily on a dollar-for-dollar basis. Provision is made for changing or substituting suppliers, pursuant to regulations of the Federal Energy Administration.[1]

The Atlantic Richfield Company (ARCO) was appellants' 1972 base period supplier. In late 1976 or early 1977 ARCO sold its Texas pipeline terminals to the Foremost Petroleum Corporation (Foremost) at which time ARCO, Foremost and each of the appellants executed three-party agreements on standard FEA forms which petitioned the agency to terminate ARCO's obligations as base period supplier and to assign the appellants' base period entitlements to Foremost. The three-party agreements were submitted to the agency for approval, and the FEA subsequently entered orders based on the agreements. The agreements make no mention of price, but

[1] FEA became a part of the Department of Energy on October 1, 1977, 42 U.S.C. § 7151(a); Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977). This opinion will refer generally to the FEA, as did the order of the district court.

refer only to volume. Appellants allege in the fourth count of their complaint that Albert B. Alkek, who exercised full authority over the day-to-day petroleum sales and distribution operations of Foremost, "falsely promised that each of the Plaintiffs would have the same price and other terms for the purchase of motor gasoline and diesel fuel as they had with ARCO (the base period supplier) and in effect would enjoy the same business practices as prevailed with ARCO during the base period subject to the legitimate adjustments available to ARCO." Appellants allege that within weeks thereafter Foremost "willfully and maliciously" instituted unilateral discriminatory and retaliatory price increases with intent to injure the appellants and remove them from competition with Foremost. In addition to price increases, appellants allege that Foremost willfully imposed discriminatory supply terminal requirements, withheld established freight allowances, and restricted credit terms, all contrary to normal business practices. The sixth count of the complaint sought recovery of damages against Foremost for breach of contract, against Alkek for inducing such breach of contract, and against both Foremost and Alkek for false and fraudulent promises and representations.

The fourth count alleges that "the Defendants [including ARCO] have undertaken a willful course based upon false and fraudulent promises to knowingly and drastically vary the base period supplier-purchaser relationships had by the Plaintiffs and other members of the Class." This allegation of fraud, while thin as to ARCO, is sufficient to withstand a Rule 12(b)(6) motion.

On December 15, 1977, the district court held a hearing on the appellees' motions to dismiss. No court reporter was present. The opinion of the district court indicates that, at the time of the hearing, counsel for both sides were in apparent agreement that the key issue in the case was whether or not Foremost was required to supply the appellants with motor fuel at ARCO's base price, and that the antitrust allegations made in appellants' complaint derived in their entirety from the alleged

violations of the EPAA and the regulations promulgated thereto. Counsel for appellants stated at oral argument that the district court had indicated it would rule on the motion to dismiss within a week or ten days, and that the court at no time intimated that it intended to consider the motions under Rule 56. This statement is not contradicted. Eight months later the court entered the order granting summary judgment for the appellees.

The 1946 amendment to Rule 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opoortunity to present all material made pertinent to such a motion by Rule 56.

Moore's instructs: "It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment." Advisory Committee Note of 1946 to Amended Subdivision 12(b), *Moore's Federal Practice,* Vol. 2A, ¶ 12.09[3] n. 25, at 2302. *See also* Wright and Miller, *Federal Practice and Procedure,* Vol. 5, § 1366, at 683. Rule 56(c) requires a ten-day period from the offering of the motion to the hearing of the motion, during which affidavits may be made and offered. Courts have required strict adherence to this notice requirement when a Rule 12(b)(6) motion is converted into a Rule 56 motion. *Davis v. Howard,* 561 F.2d 565, 571 (5th Cir. 1977); *Winfrey v. Brewer,* 570 F.2d 761, 764 (8th Cir. 1978); *Plante v. Shivar,* 540 F.2d 1233, 1235 (4th Cir. 1976). It is not

necessary that the notice of the conversion of the 12(b)(6) motion to one for summary judgment be made by written order; however, the record must demonstrate that all counsel were aware of the intentions of the district judge to treat the motion as converted, together with a reasonable opportunity to the non-moving party to rebut the converted motion. Since there is nothing in the record to indicate that the requisite notice was given, we find it necessary to reverse and remand to the district court. We express no view as to the final result in this case or whether, after further proceedings, a motion for summary judgment is in order.

A substantial question has been raised on appeal as to the jurisdiction of the federal court over claims involving common-law fraud. In essence appellants' theories of recovery center on their contention that they executed the three-party agreements as a result of assurances received from Alkek that prices and terms when dealing with Foremost would be "at least as good as those supplied by ARCO."[2] From this beginning point appellants sought to establish either that the three-party agreements are broad enough to include an agreement on price, or that pertinent FEA regulations establish price because of the nature of Foremost's acquisition of ARCO's terminals. Alternatively, appellants alleged that the assurances they received were fraudulent and constituted a willful attempt to circumvent the petroleum allocation act and regulations. Appellees argue that allegations of fraud are state law claims not cognizable in federal court under the jurisdictional prerequisites of the Economic Stabilization Act (ESA).

The EPAA, at 15 U.S.C. § 754(a)(1), adopted the provision for damages or other relief of the ESA, 12 U.S.C. § 1904 note (1969 Supp.).[3] This court has broadly interpreted § 210(a) of

[2] Statement of counsel at oral argument on appeal.

[3] § 210. Suits for damages or other relief.

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulations issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211) and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharges upon which the action is based, or

(2) not less than $100 or more than $1,000;. . . .

the ESA to allow the recovery of any damages arising from any legal wrong, and has interpreted § 210(b) as creating a special remedy for overcharges rather than a limit on damages available under § 210(a). *Griffin v. United States*, 537 F.2d 1130, 1135-36 (Em.App. 1976); *cf. Arnson v. General Motors Corporation*, 377 F.Supp. 209, 212 (N.D. Ohio 1974). There is case law, from a context closely analogous to the case at bar, that if a cause of action arises from fraud and deceit, it is a common-law action of which a federal court has no jurisdiction unless there is diversity of citizenship. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 241, 250 (1951).[4] Jurisdiction in that case, however, was derived from 28 U.S.C. § § 1331 and 1337 as a civil action arising under an

[4] This case involved two public electric utilities companies who were at one time under the same management through interlocking directorships and joint officers. During that relationship the two companies interchanged electric energy, shared expenses, and made a number of intercompany contracts establishing rates and charges, which contracts were filed with and accepted by the Federal Power Commission. The plaintiff company alleged that the interlocking directorships resulted in a constructive fraud, in that it paid unreasonably high prices for what it received, and unreasonably low rates for what it provided. The Court in effect held that it was the exclusive power of the Commission to establish reasonable rates, and that the Federal Power Act added nothing to the pre-existing common-law right not to be defrauded into paying an excessive or unreasonable rate. Mr. Justice Frankfurter dissented, joined by three other justices.

act of Congress regulating commerce. Jurisdiction in the present case is granted under § 210(a) of the ESA for "[A]ny person suffering legal wrong because of any act or practice arising out of this title. . . ." We interpret this language as being sufficiently broad to encompass a cause of action arising from a fraudulent representation intended to induce one to forego his rights under the EPAA

It is the failure of the court to give notice of conversion of the motion that principally necessitates the remanding of this case for further proceedings. We find no error in the manner in which the court construed the termination agreements on their face. The agreements make no mention of price, and the FEA has ruled that a purchaser who enters into a termination agreement, requesting and receiving FEA approval of the termination, thereby becomes a new wholesale purchaser under the express language of 10 C.F.R. 211.12(e). Interpretation 1977-28, 42 Fed. Reg. 46271, Sept. 15, 1977 (Mobile Oil Corporation). While we believe that appellants sufficiently stated their allegations of fraud and willfulness in the fourth and sixth counts of their amended complaint, we appreciate the opinion of the district court that price is the key issue, since it would appear that appellants' allegations of fraud were at all times secondary to their attempt to establish price under the pertinent regulations.[5] Nevertheless, "[T]he concepts of notice,

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[5] Econ O-Gas, Inc., an appellant herein, submitted an application for exception and petition for special redress to the Department of Energy, seeking relief from the three-party agreement it had signed with ARCO and Foremost. In denying relief, the DOE stated that Econ-O-Gas had not alleged that it was coerced in entering into the three-party agreement, and added that it was not the FEA's responsibility to make certain that Econ-O-Gas had read and understood the pricing regulations which would govern its relationship with Foremost or that the firm had reached a contractual relationship which it would find satisfactory from a business standpoint. Apparently fraud was not alleged before the DOE. See *Econ-o-Gas, Inc.*, Case Nos. DEE-1416, DSG-0031, 3 DOE ¶___(February 12, 1979).

admissibility, and opportunity to be heard are ancient primaries. . . . However, correct the conclusion below may be in the end, we cannot allow the shaving of principles for expediency when those precepts assure order and justice." *Davis v. Howard, supra,* at 572.

VACATED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NEWMAN OIL COMPANY, ET AL
VS. NO. CA3-77-0435-F
ATLANTIC-RICHFIELD CO., ET AL

ORDER

This is a suit brought by a large number of local distributors of motor gasoline against the Defendants alleging violations of the antitrust laws of the United States, the Emergency Petroleum Allocation Act of 1973, the Clayton Act as amended by the Robinson-Patman Act, and common law breach of contract and false representation. Defendants' motions to dismiss, which I interpret broadly as motions to dismiss and motions for summary judgment, are before the Court for discussion.

In their complaint Plaintiffs allege that during the period of time prior to 1972 there was an excess supply of motor gasoline and Plaintiffs and other members of the class who purchased gasoline from the major oil companies could cease doing business with one company and choose another supplier. In 1973, with the advent of the nationwide gasoline "shortages", and the enactment by Congress of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. 751, et seq.) Plaintiffs were required to return to the supplier who had supplied them in the 1972 base period. They were thereafter allocated the available product on a monthly basis in direct proportion to the ratio of the amount of motor gasoline they had received from the supplier in the 1972 base period as compared to the total motor

gasoline output of that refiner in the corresponding period of 1974 and each period thereafter. The regulations of the FEA permit the change in suppliers, but after the advent of the "shortages" and enactment of the EPAA, a change of suppliers was not possible for the Plaintiffs and the other members of the class because virtually all motor gasoline sold by suppliers was allocated to specific customers, including the Plaintiffs and other members of the class. Plaintiffs therefore allege that in order to be able to change suppliers, there must be a supplier who has a sufficient supply of unallocated motor gasoline which it would be willing to irrevocably allocate to supply the needs of one of the Plaintiffs, and Plaintiffs contend that such a supplier is impossible to find in view of the large volumes of motor gasoline which Plaintiffs and other members of the class are committed to supply to others.

The Atlantic-Richfield Co. (Arco) was supplying gasoline to the Plaintiffs during the "shortage" period. In late 1976 or early 1977 Arco sold its Texas pipeline terminals to Foremost, and transferred to Foremost its supply obligations to the Plaintiffs and other members of the class. The essence of Plaintiffs' complaint, as I interpret it, is that after Foremost acquired a supplier relationship with the Plaintiffs, Foremost raised its prices for gasoline to the Plaintiffs, and allegedly attempted to force the Plaintiffs out of business.

On December 15, 1977, I held a hearing on the Defendants' motions to dismiss. At that time counsel for both sides were in apparent agreement that the key issue in this case was whether or not Foremost was required to supply the Plaintiffs with motor fuel at Arco's base price, and that the antitrust allegations made in Plaintiffs' complaint derived in their entirety from the allegations by Plaintiffs of violations of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 et seq. the Federal Energy Administration Regulations thereunder, 10 CFR of §§ 210-212, and § 210 of the Economic Stabilation Act of 1970, 12 USC § 1904. Plaintiffs contend

that Foremost was required to supply motor fuel at Arco's base price, and that therefore the EPAA was violated, and that therefore the Texas and United States antitrust laws were violated. Counsel were in apparent agreement that if I concluded that Foremost could legally charge higher prices than Arco in supplying the Plaintiffs, the Plaintiffs' EPAA claims would be without merit, the Plaintiffs' antitrust claims would therefore be without merit, and Plaintiffs' state claims could be dismissed without prejudice to refiling in the State Court. After reviewing the pleadings and briefs in this case, I conclude that: (1) the price question is the key issue for the Court to decide in this case, and (2) Foremost was not required to supply the Plaintiffs with motor fuel at Arco's base price.

Plaintiffs all apparently entered into "three party agreements" with Arco and Foremost to terminate Arco's supplier relationship with the Plaintiffs and substitute Foremost Petroleum. These agreements were submitted to the FEA, because under FEA regulations the supplier-purchaser relationship cannot be terminated without agency approval. 10 C.F.R. § 211.9(a)(2)(i). Without Plaintiffs' consent to a permanent change in the supplier-purchaser relationship (consent which was given by the Plaintiffs in their execution of the three-party agreements) Arco and Foremost would have had to seek FEA approval of the change through an FEA exception proceeding. 10 C.R.F. § 205.50 et seq.

Plaintiffs review the third party agreements and conclude that either the agreements themselves or FEA orders contemplate Foremost's obligation to provide each of the Plaintiffs with their base period entitlement of given volume of motor gasoline. Plaintiffs interpret this requirement as being substantially broader than simply a given number of gallons of motor gasoline, but rather includes an obligation to supply the gasoline at the same price. Plaintiff's contention is summarized on page 14 of its response to Defendant's motions for dismissal, filed October 18, 1977.

> "Essentially, but without limitation, the full obligation is: (1) *volume* 10 C.F.R., Parts 210 and 211; Product availability, 10 C.F.R., Page 210; (3) price, 10 C.F.R., Parts 210 and 212; (4) Credit terms, 10 C.F.R., Parts 210 and 212; and (5) Freight policy, 10 C.F.R., Part 210 as these essential factors existed during the 1972 base periods of the buyer/purchaser relationship (Arco/Plaintiffs) and as established by the May 15, 1973 price charged by Arco to the Plaintiffs (with proper adjustments allowable to Arco)."

The first problem with Plaintiffs' argument is that the agreement itself refers only to an "assignment of supplier and base period volume." See page 4, Plaintiff's response to Defendant's motion for dismissal, filed October 18, 1977. A subsequent order by the FEA directed that Foremost supply each of the Plaintiffs with a specified volume of gasoline. Plaintiffs apparently do not contend that Foremost has failed to supply Plaintiffs with the required volume of gasoline, as is their admitted obligation under the agreement, and the agreement itself does not expressly extend to price, credit terms or other requirements that the Plaintiffs would like to read into the agreement. I find the agreements are in no way ambiguous on this point.

The FEA has recognized that under a three-party agreement, the Purchasers "entitlement" is limited to the volume of the product specified therein. (Interpretation 1977-28, 42 F. Reg. 46271, Sept. 15, 1977, hereinafter referred to as the "Mobil" decision). When a wholesale purchaser reseller receives FEA approval of termination of its base period supply relationship (in the context of a three party agreement approved by the FEA), it becomes a new "wholesale purchaser" under 10 C.F.R. 211.12(e). *Mobile decision.* Subsection (e) provides in part:

> *"New Wholesale Purchasers.* Wholesale purchasers which do not have base period suppliers and whole-

> sale purchasers whose base period suppliers are unable to supply them with sufficient amounts of an allocated product shall be supplied as provided in this paragraph. 10 C.F.R. ¶ 211.12(e)."

Plaintiffs in this case were assigned to Foremost pursuant to FEA regulations whereby Plaintiffs are defined as "new wholesale purchasers" having no base period supplier. Under the *Mobil* decision and 10 C.F.R. § 211.12(e) it is clear that Plaintiffs have no right to a price charged them by Foremost computed under regulations applicable to Arco. As discussed in *Mobil*, the three-party agreements entered into by the parties did obligate Foremost to supply specific volumes of gasoline to the Plaintiffs, but they did not obligate Foremost to supply those volumes of gasoline using Arco's pricing structures or Arco's normal business practices in calculating prices charged to Plaintiffs.

Any reliance Plaintiffs place upon 10 C.F.R. § 211.25 is misplaced because that section refers to "substituted suppliers" whereas the three party agreements in the FEA order terminated Arco's obligation to supply Plaintiffs. Compare 10 C.F.R. § 211.25 with 10 C.F.R. § 211.9. Foremost is not a substitute supplier within the meaning of § 211.25.

Plaintiffs also rely on 10 C.F.R. § 212.111(c)(1) in arguing that that section requires Foremost to supply specific volumes to Plaintiffs at Arco's price. This section is not applicable however, because Foremost did not acquire a going business from Arco under the regulations. See F.E.A. Opinion Exhibit B to the motion to dismiss memorandum of Defendants Albert B. Alkek and Foremost, filed November 30, 1977.

Plaintiffs also rely heavily on the *Whitco* decision. 2 F.E.A., ¶ 83,170, (June 9, 1975). *Whitco* is procedurally distinguishable from this case. Whitco, Inc. requested an exception from the provisions of 10 C.F.R. § 221.25 which would direct Sun Oil Co., Whitco's base supplier, to cease supplying that firm through a third party but rather supply Whitco directly. This

case does not involve an exception proceeding but a three party agreement which expressly terminated ARCO's relationship with the Plaintiffs and the terms of that termination (and the terms of Foremost's new obligations to the Plaintiffs) were governed by this express agreement and subsequent FEA order. *See also Lee Moore Oil Co. v. Union Oil Co. of Cal.*, 1977-2 Trade Cases, Trade Reg. Reports § 61,766.

Finally, any violation of sections 210 and 211 of the Economic Stabilation Act of 1970 must allege a "willful" overcharge. The standard for "willfulness" is the criminal standard, not the civil standard. *Longview Refining Co. et al v. Shore, et al,* 554 F.2d 1006 (TECA 1977). Plaintiffs' complaint does not allege a "willful" overcharge; in fact, in ¶ 55 of their complaint, Plaintiffs indicate they do not have to make *any* showing of willfulness. Secondly, no facts in the complaint sufficiently detail the circumstances of a "willful" overcharge. Finally, I can discern no violation of the EPAA and regulations, and therefore if Defendants are in compliance with the EPAA, I cannot see how their actions in compliance "willfully" violated the Act.

Accordingly, the Court hereby dismisses with prejudice all of the Plaintiffs' claims against the Defendants asserted under the laws of the United States. The Court also dismisses without prejudice Plaintiffs' pendent claims asserted under state law against the Defendants. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 716 (1966); 13 Wright & Miller, Fed. Practice and Procedure, § 3567 (1975).

It is so ORDERED.

[Signature illegible]

UNITED STATES DISTRICT JUDGE

DATE August 15, 1978

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-32

NEWMAN OIL COMPANY, et al.,
Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY, et al.,
Defendants-Appellees.

BEFORE HONORABLE WALTER HOFFMAN, HONORABLE JOE McDONALD INGRAHAM, and HONORABLE WALTER P. GEWIN, JUDGES.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Texas, Dallas Division and was argued by counsel.

In consideration whereof it is ordered that the judgment of said court is VACATED and REMANDED.

FOR THE COURT:

Ruth H. Jacobson
Clerk

April 20, 1979

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-32

NEWMAN OIL COMPANY, et al.
Plaintiff-Appellant

v.

ATLANTIC RICHFIELD COMPANY,
ALBERT B. ALKAK AND FOREMOST
PETROLEUM CORPORATION, Inc.
Defendants-Appellees

BEFORE HONORABLE WALTER E. HOFFMAN, HONORABLE JOE M. INGRAHAM and HONORABLE WALTER P. GEWIN, JUDGES.

Upon consideration of the Petitions for Rehearing and Suggestions for Rehearing *En Banc* of appellees Atlantic Richfield Company, Albert B. Alkak and Foremost Petroleum Corporation,

IT IS HEREBY ORDERED that said Petitions and suggestions are hereby denied.

FOR THE COURT:

RUTH H. JACOBSON Clerk

by: Melissa Frink, Deputy Clerk

May 25, 1979